Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1036

THE HONORABLE ADRIAN A. SPEARS, CHIEF JUDGE,
UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TEXAS

and

OLETA GRAVITT, INDIVIDUALLY AND AS
INDEPENDENT EXECUTRIX OF THE ESTATE OF
T. O. GRAVITT, DECEASED; MICHAEL GRAVITT;
PATRICK GRAVITT; AND JAMES H. ASHLEY,

Petitioners,

VERSUS

SOUTHWESTERN BELL TELEPHONE COMPANY,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
AND CHESTER L. TODD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LAW OFFICES OF PAT MALONEY, INC.
2001 Frost Bank Tower
San Antonio, Texas 78205

ATTORNEYS FOR PETITIONERS

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COUNSEL FOR PETITIONERS

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered November 12, 1976, affirming, *en banc*, the decision of a Panel for the Fifth Circuit granting a Writ of Mandamus.

OPINIONS BELOW

1. The Judgment of the United States Court of Appeals for the Fifth Circuit is reported in 542 F. 2d 297, and appears in the Appendix hereto.

2. The Judgment of the Panel of the United States Court of Appeals for the Fifth Circuit appears at 535 F. 2d 859, and is included in the Appendix hereto.

3. The Order of the United States District Court for the Western District of Texas at San Antonio, remanding the civil action styled: *Mrs. Oleta Gravitt, et al. Vs. Southwestern Bell Telephone Company, et al.*, appears in 416 Fed. Supp. 830, and is set forth in the Appendix hereto.

JURISDICTION

1. The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A. Did the Congress, in providing that a Remand Order " . . . is not reviewable on appeal or otherwise . . ." intend to authorize the Federal Appellate Courts to review an Order of a District Judge remanding a case because it was improperly removed?

B. Did this Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976), limit Appellate review of Remand Orders to the question of whether or not the District Court ordered the Remand pursuant to 28 U.S.C. § 1447(c)?

C. Has the Court of Appeals erred in reviewing and examining by mandamus the District Judge's Order of Remand in a diversity case, the Order of the District Judge remanding the case, having delineated the requirements of 28 U.S.C. § 1447(c), and making the appropriate findings thereunder?

D. Is this case not completely contrary to two prior decisions of the Fifth Circuit (*Robertson v. Ball*, 534 Fed. 2d 63, 1976; *London v. U.S.F.&G.*, 531 Fed. 2d 257, 1976)?

STATUTES INVOLVED

28 U.S.C. § 1447:

*** * ***

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdic-

tion, the district court shall remand the case, and may order the payment of just costs . . . ."

(d) An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise . . . ."

STATEMENT OF THE CASE

On April 28, 1976, the Honorable Adrian A. Spears, Chief Judge of the United States Court for the Western District of Texas, remanded to Texas State Courts an action styled: *Mrs. Oleta Gravitt, et al, vs. Southwestern Bell Telephone Company, et al; No. SA 75 CA 117.*

On May 5, 1976, Respondents herein filed a Petition for a Writ of Mandamus with the United States Court of Appeals for the Fifth Circuit, directing the District Court to accept and retain jurisdiction of this action.

On May 17, 1976, the Fifth Circuit ordered the Petitioners herein to file an Answer to the Petition for Writ of Mandamus.

On July 9, 1976, a Fifth Circuit panel directed Judge Spears to vacate his Remand Order and conduct further proceedings not inconsistent with its Opinion, that is, to make a determination of whether Southwestern Bell Telephone Company was a Missouri corporation.

Judge Spears timely filed a Petition for Rehearing, as did the individual litigants.

The Motions for Rehearing En Banc were granted, and the Fifth Circuit determined that this case should be heard before the full Court, *en banc.*

On November 12, 1976, the Fifth Circuit modified the decision of the Panel and ordered a Writ of Mandamus to the District Court to vacate its Remand Order, without request for additional findings.

This case comes before this Honorable Supreme Court accompanied by a vigorous, precise and comprehensive dissenting opinion filed by Justices Hill and Clark of the Fifth Circuit, which correctly states the applicable law.

As noted by Justice Hill, it is apparent this is a "hard case". The District Judge first refused and subsequently, upon reconsideration, granted a Remand; the Panel decision of the Court of Appeals was reviewed by the entire Court *en banc.* Affirmance in part and dissent followed.

The predictive fears of the Chief Justice and Justices Rehnquist and Stewart, have come to pass, or, as Justice Rehnquist stated in his dissent "Rather than leaving future repetition of cases such as this to Congress, the Court sets out to right a perceived wrong in this individual case. In the process of doing so, it reopens an avenue for dilatory litigation which Congress had explicitly closed". The monumental concern of all future litigants as to the uncertainty of review of remand orders caused by this case is powerfully apparent. The flood gate of litigation to this Court and all others is wide open.

ARGUMENT

Judge Spears' Order comes squarely within the requirements of *Thermtron Products, Inc. v. Hermansdorfer,* 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) *in that an express finding of improper removal was made by Judge Spears.* It is clear, also, that the doctrine of judicial estoppel is the kind of substantive policy expression which the *Erie* doctrine makes binding on Federal

Courts, and the reasons given by Judge Spears are *not* reviewable.

The Court of Appeals is totally lacking jurisdiction, and is completely without authority to control or review the Order of Remand entered by Judge Spears. Lacking jurisdiction, the Circuit Court clearly *cannot* and *must not*, examine the *merits* of Petitioners' contentions that Judge Spears acted upon grounds not permitted by the Statutes. *Sheldon v. Sill*, 8 Howe, 441, 12 L. Ed. 1147, *1850* has expressly prohibited the review sought by the Petitioners.

Title 28 U.S.C. § 1447(d) means what it says, viz:

> "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise . . . ."

The decision is a clear invasion into the province of the District Court and such improper action can only create judicial havoc and destroy the right of a litigant to a speedy trial which *Thermtron*, Congress, and precedent have heretofore jealously protected by recognizing § 1447(c), means precisely *what* it says! For a hundred years, this statute has been so interpreted until now.

This case has been set for trial *four times in State Court* – a constitutional right to a speedy trial which has been recklessly abused by the improper removal.

The Congressional purpose in barring review of remand orders was to prevent significant interference with litigation commenced in State Courts. *Thermtron* was never written to subvert such aim. The majority of the Court below have seriously misread such decision with obvious disregard for the warning contained in the vigorous dissent in such opinion.

By statute and case interpretation, the Honorable Adrian A. Spears, Chief Judge, United States District Court for the Western District of Texas, is, and should be, the final arbiter of whether this specific action should be tried in Federal Court.

Thermtron, 96 S. Ct. 584, *595*, states:

> "It is clear that the ability to invoke appellate review, even if ultimately unavailing on the merits, provides a significant opportunity for additional delay. Congress decided that this possibility was an unacceptable source of additional delay and therefore made the district courts the *final* arbiters of whether Congress intended that specific actions were to be tried in a federal court." (Emphasis added).

Thermtron is limited entirely to the unique circumstances of that case, wherein the Trial Judge acknowledged the removal was proper but he refused to exercise the jurisdiction which he conceded vested in the Federal Courts! Judge Spears, on the other hand, clearly decided that the instant case was removed improvidently and without jurisdiction. Factually, *Thermtron* and this case are unrelated.

If the decision of the Fifth Circuit is permitted to stand, the Federal Appellate Courts will be deluged with dilatory, time-consuming and unauthorized "appeals" from remand orders by simply captioning such appeals "Mandamus". If it works in this case, why not in hundreds hereafter where giant corporations simply do not want to go to trial? Chief Justice Burger has repeatedly warned the federal Judiciary and others that the less fortunate litigant is being drowned in a sea of paper, discovery and appeals. Such actions should be stopped, or hope of justice will undoubtedly languish and die.

The Circuit Court in this case pretermits reference to the

only issue in the case, viz: Whether the Fifth Circuit has jurisdiction to review the Order of Remand entered by the District Court, because:

> " . . . If no jurisdiction existed, it, of course, follows that there was no power in the Court of Appeals to examine the merits of Petitioners' contentions that the Order of Remand exceeded Respondent's authority, and that its Order denying relief must be affirmed." (Dissenting opinion, *Thermtron*, p. 594).

For nine decades it has been the law that it does not *matter* whether this Court disagrees with a District Judge's reasons for remand; the District Judge *alone* has the right to determine whether removal is proper.

The majority opinion not only misapplied the holding of *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), but also prior decisions of the Fifth Circuit, to-wit: *Robertson v. Ball*, 534 F. 2d 63 (5th Cir. 1976); and *London v. United States Fire Ins. Co.*, 531 F. 2d 257 (5th Cir. 1976).

In *Robertson*, the Fifth Circuit recognized the non-reviewability of a finding of no jurisdiction, viz:

> "The Court below expressly stated that 'this action was improperly removed under § 1441(d) . . .' because the action was not 'one of which this Court would have had original jurisdiction'. *We have no occasion to determine whether or not the conclusion of the District Court was well founded.*" (Emphasis supplied).

Judge Spears determined that there was both improper removal and no jurisdiction – however, he could have remanded upon a finding of either. That was the specific holding in *Robertson:*

> "Although the standard set out in § 1447(c) and tracked in the quoted language from *Thermtron* is in the conjunctive – i.e., is stated as if the District Court must find *both* inprovident removal and lack of jurisdiction – *it is clear that the district court may remand a case improvidently removed even if the defect*, e.g., untimeliness under § 1446 (b), *is not jurisdictional*". See London v. United States Fire Ins. Co., 5th Cir. 1976, 531 F. 2d 257, 260.

The Panel in *Robertson* correctly interpreted *Thermtron* as holding:

> "As we read *Thermtron*, the express invocation by the District Court of the § 1447(c) grounds for remand of a removal under § 1441(b) *robs this Court of any power 'through appeal or otherwise' to review the merits of the Remand Order.*" (Emphasis supplied).

This Supreme Court in *Thermtron* said § 1447(c) should be read in *pari materia* with § 1447(d), which says:

> "An Order remanding a case to the State Court from which it was removed is not reviewable upon appeal or otherwise . . . ."

> "Only Remand Orders issued under § 1447(c) and invoking the grounds specified therein – that removal was improvident and without jurisdiction – are *immune from review under § 1447(d)*". (Emphasis supplied).

A District Judge is not required to explain findings of "improvident removal and without jurisdiction" grounds of § 1447 (d); merely set them forth in his Removal Order. If the District Court does elect to recite its reasons for the basis of such grounds, the Court of Appeals has no authority to question them. Certainly, no penalty should be assessed because a

District Court states the basis for its ruling. The parties are entitled to the benefit of the Court's position, whether the reasons given are, in the opinion of the Appellate Court, correct or not, and the District Judges should be encouraged, rather than discouraged, to state their reasons for their conclusions reached. This procedure will be a value to the parties in the Appellate Court if the matter is later presented on appeal after the trial of the case on its merits.

The vital question in this case, therefore, is whether *when* the District Judge finds improper removal and no jurisdiction (as he clearly did in this cause), is such finding reviewable by mandamus or otherwise? The answer is that it is *not*, and the Fifth Circuit's decision, therefore, should be reversed.

Thermtron unequivocally supports the foregoing observation, stating:

> "There is no doubt that in order to prevent the delay in the trial of remanding cases by protracted litigation on jurisdictional issues, *United States v. Rice*, 327 U.S. 742, *751* (1946), Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c) *whether or not that Order might be deemed erroneous by an appellate court*". (Emphasis supplied).

Even if Judge Spears erred in applying the doctrine of judicial estoppel as a basis for his conclusion that this case was removed improvidently and without jurisdiction, the Appellate Court is precluded from inquiring as to whether such reason was appropriate.

This Court, in *Thermtron*, repeatedly noted that diversity jurisdiction was *stipulated*, that there was no question but that the *District Court had jurisdiction*, that there was no suggestion

that the cause was improvidently removed, that *the only reason for the Remand was the fact that the District Judge was "too busy"*. In *Thermtron*, the District Judge acknowledged that the case was properly removed and there was no disagreement with such observation by any of the interested parties. Faced with such an obvious denial of the statutory rights in the Federal Court, this Court understandably held that review by mandamus should lie.

Thermtron does not stand for the concept that the District Court is limited in its inquiry as to whether, in fact, diversity exists. Such a result comes from a totally incorrect reading of that case, which merely requires the District Court to determine that it is without jurisdiction. Judge Spears' findings in this case come squarely within such requirement.

It becomes apparent that the Supreme Court considered the Trial Judge's action in *Thermtron* as blatent indifference to the federal jurisdiction statutes, and in fact, the District Judge's actions in such case were "reported to the Circuit Counsel for the Sixth Circuit, which had supervisory powers over the District Court". (Footnote, page 598).

It is most inaccurate and unfair to analogize the action of Judge Spears with those of the Respondent in *Thermtron*. Judge Spears carefully, emphatically, summarily and properly rejected any extraneous and nonjurisdictional reasons why he might desire remand.

Writs of Mandamus issued by the Federal Appellate Courts to lower Federal Courts traditionally have been available only in unusual circumstances, sometimes said to be those involving a lower Court's "usurpation of power". *DeBeers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 217.

"As extraordinary remedies, they are reserved for really extraordinary causes. Ex Parte *Fahey*, 332 U.S. 258, 260 (1947)."

The doctrine of judicial estoppel is firmly ensconced in the jurisprudence of the State of Texas. It forbids parties from taking contrary positions under oath in different judicial proceedings. A plethora of cases is found upholding and recognizing this doctrine. Judicial estoppel may be invoked by strangers to the Record in formal proceedings. *Swilley v. McCane*, 374 S.W. 2d 81 (Tex. 1964; *Long v. Knox*, 155 Tex. 581, 291 S.W. 2d 292).

There is absolutely nothing in Judge Spears' Remand Order that warrants the statement by Petitioners that extraneous factors such as "congestion of the docket", were relied upon by him in remanding this cause.

The language of the Remand Order is unambiguous and clearly reflects the only basis of the decision by the District Judge was that the requisite of diversity of citizenship was not present and the conclusion unavoidably was that the action therefore was improperly removed.

This Supreme Court, in *Angel v. Bullington*, 303 U.S. 183 (1947); and *Woods v. Interstate Realty Company*, 337 U.S. 535, makes it clear that a State law can have a limiting effect on the Federal Court's diversity of jurisdiction. The significance and the public policy underlying the limiting state rule must be considered. The cases of *Sabanay v. Beech Aircraft Corporation*, 349 F. 2d 60 (4th Cir. 1965); and *Miller v. Davis*, 507 F. 2d 308 (5th Cir. 1974) considered similar questions.

CONCLUSION

Thus, we have come full circle. The current case is in total defiance with the prevailing decision of this Court decided only a year ago, and two cases previously decided by the same Circuit. This decision destroys 100 years of precedent and spells ruin for future litigants and those who take comfort in the Congressional intent that remand is not reviewable if the findings of the Court are that removal was improper. The Circuit Court clearly does not have jurisdiction over Judge Spears' decision to remand, and unless reversed, every time an affluent litigant is dissatisfied, he can and will use mandamus as a means of review and method to delay and thwart clear ends of justice. Plainly much, much more is at stake other than the loss of these individual Plaintiffs' rights.

PRAYER

WHEREFORE, Petitioners pray that a Writ of Certiorari be issued out of and under the seal of this honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, and to all parties hereto, granting all relief to which these Petitioners may be entitled, at law or in equity.

Respectfully submitted,

LAW OFFICES OF PAT MALONEY, INC.
Pat Maloney
Jack Pasqual

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(512/226-5125)

By Pat Maloney Pers. a.s.
Pat Maloney
COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, has been furnished to all counsel of record in this case, to-wit: Mr. Jack Hebdon, 2000 Frost Bank Tower, San Antonio, Texas 78205 by hand delivery; Mr. Hubert Green, 900 Alamo National Bldg., San Antonio, Texas 78205; Mr. James Barden, 1010 North St. Mary's Street, San Antonio, Texas; and Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, New York 10005; all by U.S. regular mail; on this the 3rd day of January, 1977.

Pat Maloney Pat M. a. s.

Pat Maloney

APPENDIX

* * *

WEST KEY NUMBER SYSTEM

In re SOUTHWESTERN BELL TELEPHONE COMPANY, American Telephone and Telegraph Company, and C. L. Todd, Petitioners.

No. 76-2237.

United States Court of Appeals, Fifth Circuit.

Nov. 12, 1976.

Petition was filed for writ of mandamus to the United States District Court for the Western District of Texas, Adrian A. Spears, Chief Judge. The Court of Apppeals, 535 F. 2d 859, held that district court could not utilize doctrine of judicial estoppel as basis for holding that case was removed "improvidently and without jurisdiction" and issued writ of mandamus directing district court to vacate remand order and conduct further proceedings. In a subsequent opinion, the Court of Appeals held that where plaintiffs made no claims that corporate defendant was not Missouri corporation or that its principal place of business was not in Missouri but their claim was one of law that defendant corporation was barred by doctrine of judicial estoppel from asserting undisputed facts as basis for federal jurisdiction, there was no occasion to direct district court to inquire further into diversity issue.

Decision of panel affirmed as modified; writ of mandamus issued directing district court to vacate remand order.

Hill, Circuit Judge, filed dissenting opinion in which Clark, Circuit Judge, joined.

Courts Key 404(4)

Where plaintiffs, who sought remand of tort action to Texas state court, made no claim that defendant was not Missouri corporation or that its principal place of business was not in Missouri but rather they claimed that defendant was barred by doctrine of judicial estoppel from asserting undisputed facts as basis for federal jurisdiction, there was no occasion to direct district court, which may not utilize doctrine of judicial estoppel as basis for holding that cause has been removed improvidently, to inquire further into diversity issue and thus writ of mandamus would be issued directing district court to vacate remand order. 28 U.S.C.A. § 1447(c).

Jack Hebdon, Green & Kaufman, Inc., Hubert W. Green, James E. Barden, San Antonio, Tex., Dewey, Ballantine, Bushby, Palmer & Wood, Leonard Joseph, New York City, for petitioners.

Adrian A. Spears, U.S. Dist. Court Chief Judge, Pat Maloney, San Antonio, Tex., for Gravitt.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, GEWIN, AINSWORTH, GODBOLD, DYER, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges. *

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* Circuit Judges Wisdom, Thornberry, Coleman, Goldberg and Morgan did not participate in this decision.

PER CURIAM:

The court en banc affirms the decision of the panel on the basis of the panel opinion except as follows.

It is starkly revealed to the court en banc that plaintiffs do not make any real contentions of fact. They make no claim that Southwestern is not a Missouri corporation or that its principal place of business is not in Missouri. Their claim is one of law rather than fact. Standing squarely on the estoppel theory advanced by them in the District Court and adopted by that court, they say that Southwestern is barred from asserting the undisputed facts as a basis for federal jurisdiction. For reasons set out in the panel opinion, that proposition of law is erroneous. 1/

With the case thus clarified, it now appears that there is no occasion to direct the District Court to inquire further into the diversity issue.

As modified, the decision of the panel if AFFIRMED. A writ of mandamus will issue directing the District Court to vacate its remand order.

HILL, Circuit Judge, with whom CLARK, Circuit Judge, joins (dissenting):

1/ In their first effort to remand the cases, plaintiffs asserted that the District Court had plenary discretionary power to remand even though statutory requirements for federal jurisdiction were alleged and uncontested. The district judge properly rejected this frivolous proposition. This litigation should not be impeded with an further efforts by the plaintiffs to avoid federal jurisdiction on insubstantial grounds.

It has well and truly been said that "Hard cases make bad law." 1/ My respected brother on the district court and my respected brothers comprising the majority of the court today seem to take that statement as a mandate. I view it as a warning. Therefore, I must respectfully dissent.

There is no universal definition of a "hard" case as contemplated by the maxim quoted above. I submit that the court faces a "hard" case whenever the judge of the court has the *power* to order that which he believes to be right and, yet, he does not have the *authority* to issue the order. The restraint then required leaves the wrong result undisturbed.

As presented in the district court, this case qualified as a "hard" case under my suggested definition. The action was commenced in state court against two corporate defendants and an individual. The individual defendant was a citizen of the forum state. On the eve of trial plaintiff's counsel reflected upon his situation. Like Aesop's fabled pup who dropped his bone to grab one seen in reflection, plaintiff discarded his built-in immunity from the "danger" of removal in order to seize the exquisite pleasure of proceeding against only corporate defendants. Before the ripples in the pool made by the dropping of the individual defendant had subsided, plaintiff found his case in the federal district court.

The district judge felt that the case never should have been in his court. It had arrived only through accident. Although ready for trial under state procedures, additional discovery available in the federal court demanded extensive new pretrial activity. Nevertheless, the district judge refused to disregard the

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1/ *See Metropolitan National Bank of Kansas City v. Campbell Commission Co.*, 77 F. 705, 710 (W.D. Mo. 1896).

law and serve his own yearnings, and he forthrightly declined to order remand of the case absent a valid motion upon valid grounds. 2/

Ultimately, plaintiff filed a motion for remand, asserting that complete diversity of citizenship did not exist between plaintiff on the one hand and defendants on the other. In support, plaintiff presented what appears to have been rather significant evidence. The defendant Southwestern Bell Telephone Company, whose non-Texas citizenship was necessary for complete diversity, had theretofore filed a sworn pleading in a Texas state proceeding asserting that it was a Texas corporation and resident of Dallas. The district court decided the issue on a motion to remand based upon the evidence before him. The sworn statement by the corporate defendant was before the court. The court declined to hear contrary evidence from the defendant, citing the common law doctrine of judicial estoppel. Based, therefore, upon the evidence before the court, and limited to the evidence which the court was willing to accept, the district judge held that complete diversity of citizenship was lacking and the case had been "improperly removed" and ordered it remanded to the state court. 3/

2/ He made it clear that if the plaintiff were to be successful in a motion to remand the case to the state court, the plaintiff would have to demonstrate that federal jurisdiction as contemplated by 28 U.S.C. §§ 1332, 1441 did not exist. *See Gravitt v. Southwestern Bell Telephone Co.*, 396 F. Supp. 948 (W.D. Tex. 1975).

3/ The only issue presented to the district court on the motion to remand was whether complete diversity of citizenship existed between the parties. Since he answered this question in the negative, the district court was compelled to the conclusion that he was "without jurisdiction." The original panel opinion in this court correctly assumed that the remand was ordered on the basis that the case was removed "improvidently and without jurisdiction." *In re Southwestern Bell Telephone Co.*, 535 F. 2d 859 (5th Cir. 1976).

This mandamus action by the defendant followed.

In this court the case again meets my suggested test for a "hard" case. The district court had, it was felt, dealt rather harshly with the contentions of the defendant and his invocation of judicial estoppel seemed overdone for even such a time-honored principle. It appeared that the issue had been decided incorrectly. This court has sufficient power under our system to order that the result be changed. Yet, I submit, this court does not have the authority to issue such an order.

The Congress is empowered to define the jurisdiction of our court. 4/ In its exercise of that constitutional power, it has declared that this court may not review an order of remand. Title 28 U.S.C.A. § 1447(d) provides, in pertinent part:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, . . ."

The unique case of *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) is no authority for the review of the remand order in this case. As I view it, the Supreme Court in *Thermtron* defined only one boundary to the prohibition of review by the circuit courts. It held that § 1447(d) must be read in conjunction with 28 U.S.C. § 1447(c) which provides:

> "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs."

4/ U.S. Const. Art. III, § 1.

The facts present in *Thermtron* were unprecedented. The trial judge had held that the case was *properly* removed and that it was *within* the jurisdiction of the district court. He specifically did *not* find that the case "was removed improvidently and without jurisdiction". He nevertheless ordered the case remanded to the state court because, among other reasons, he felt that the docket in the district court was overcrowded. The Supreme Court did not hold that a finding of a district court that a case had been removed improvidently and without jurisdiction was subject to review. It merely held that a district court has no authority in the law to order a remand other than pursuant to a finding that the case had been removed improvidently and without jurisdiction. The district court is limited in its authority to order remand just as the circuit judge is limited in its authority to review. It may only order remand pursuant to § 1447(c). In *Thermtron* the court said:

> "It is unquestioned in this case and conceded by petitioners that this section [1447(d)] prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. . . . If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the Court of Appeals by appeal, by mandamus or otherwise." 423 U.S. at 343, 96 S. Ct. at 589.

It is perfectly clear that, regardless of the merits of the trial court's determination, the trial judge in this case ordered the remand pursuant to § 1447(c).

If anything is clear from *Thermtron* it seems to be that the *only* question properly before a circuit court in such a case is whether or not the district court ordered the remand pursuant to § 1447(c). Yet, the majority today approves a further question posed by the panel opinion in this case.

" . . . May a district court utilize the doctrine of judicial estoppel as the basis for holding that a case was removed 'improvidently and without jurisdiction' within the meaning of § 1447(c)?"

Thus, having crossed over the Jordan on the narrow bridge seen to have been constructed by the Supreme Court in *Thermtron*, the narrow pathway has been abandoned and we spread out all over the Promised Land! The court has, though not authorized by Congress, reviewed an order remanding a case to the state court from which it was removed.

The fact that this is a full and complete review of an order of remand is best illustrated by the extent to which the majority alters the decision of our court's panel. The panel had recognized the finality of a district court's order in a case such as this by directing that the district court abandon its basis for the disapproved finding but yet hold further hearings to determine if the case had been removed improvidently and without jurisdiction. Today, the majority conclude that no such further hearings are necessary. They have reviewed the matter upon evidence presumably taken before us at the *en banc* oral arguments, and announced their findings of fact, conclusions of law, and order on the motion to remand.

It is a hard case but that is bad law.

Whether it be warning or mandate, it is clear that the statement "Hard cases make bad law" is, indeed, prophecy. Thus, respectfully, I dissent.

* * *

In re SOUTHWESTERN BELL TELEPHONE COMPANY, American Telephone and Telegraph Company, and C. L. Todd, Petitioners.

No. 76-2237.

United States Court of Appeals, Fifth Circuit.

July 9, 1976.

Rehearing En Banc Granted Aug. 3, 1976.

A petition was filed for writ of mandamus to the United States District Court for the Western District of Texas, Adrian A. Spears, Chief Judge. The Court of Appeals held that district court could not utilize doctrine of judicial estoppel as basis for holding that a case was removed "improvidently and without jurisdiction" within meaning of statute stating grounds for remand of removed case, and thus statutory barrier to review of order remanding a removed case to state court was inapplicable and mandamus was proper remedy to redress the illegal remand order.

Writ of mandamus issued directing District Court to vacate its remand order and conduct further proceedings.

1. Removal of Cases Key 107(9)

As general rule, a federal district court order remanding a removed case to state court is not reviewable on appeal or otherwise. 28 U.S.C.A. §§ 1332, 1441, 1447(d).

2. Removal of Cases Key 2

The scope of federal removal statutes is a matter of federal law. 28 U.S.C.A. §§ 1441(b), 1447(c, d).

3. Courts Key 359.1(1), 361(1)

In diversity litigation in federal courts where nonfederal issues are at stake, decisional law compels the application of the relevant state formulation of the judicial estoppel principle, if any; as to federal issues, however, United States courts are free to follow such doctrine as they think proper.

4. Courts Key 280(1)

Persons who meet statutory requirements of federal jurisdiction have a statutory, as well as a constitutional, right to resort to federal courts, and a district court has no authority to negate that right simply because such a person has not observed the consistency in pleading that the forum state may demand.

5. Courts Key 37(3)

Judicial estoppel principles cannot conclusively establish jurisdictional facts.

6. Courts Key 280(5)

If facts come to light casting significant doubt on the power of a federal court to hear a pending case, it must reexamine its jurisdiction.

7. Mandamus Key 44

Removal of Cases Key 102, 107(9)

District court could not utilize doctrine of judicial estoppel as basis for holding that a case was removed "improvidently and without jurisdiction" within meaning of statute stating grounds for remand of removed case, and thus statutory barrier to review of order remanding a removed case to state court was inapplicable and mandamus was proper remedy to redress the illegal remand order. 28 U.S.C.A. §§ 1441(b), 1447(c, d).

Jack Hebdon, Green & Kaufman, Inc., Hubert W. Green, James E. Barden, San Antonio, Tex., Dewey, Ballantine, Bushby, Palmer & Wood, New York City, for petitioners.

Adrian A. Spears, U.S. Dist. Court Chief Judge, Pat Maloney, San Antonio, Tex., for Gravitt.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas.

Before GODBOLD, RONEY and GEE, Circuit Judges.

PER CURIAM:

This mandamus proceeding arises out of a tort action commenced in 1974 in Texas state court against Southwestern Bell Telephone Co. (Southwestern), American Telephone and Telegraph Co. (AT&T), and C. L. Todd, an executive of Southwestern. Plaintiffs alleged a variety of causes of action including defamation, contractual interference, and wrongful death, and they sought $29 million in damages. In May 1975 the plaintiffs filed an amended petition dropping their claims against Todd. At that time defendants removed the action to the United States District Court for the Western District of Texas. The District Judge, in denying plaintiffs' motion to remand, accepted jurisdiction on the basis of diversity of citizenship. 1/ He evidently based this ruling on the following factual allegations: Plaintiffs were citizens of Texas, Oklahoma, and Florida. Southwestern was a Missouri corporation with its principal place of business in Missouri; AT&T was a New York corporation with its principal place of business in New York; and Todd was a citizen of Texas. Thus dismissal of Todd created complete diversity in the case, justifying removal under 28 U.S.C. §§ 1332, 1441. At the time plaintiffs did not challenge the citizen-

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1/ *Gravitt v. Southwestern Bell Tel. Co.*, 396 F. Supp. 948 (W.D. Tex. 1975).

ship of any party.

About a year later, following extensive discovery and pretrial activity in federal court, plaintiffs unearthed a pleading Southwestern had submitted in an unrelated 1968 suit filed in state court in Harris County, Texas. In that earlier proceeding Southwestern had stated under oath that it was "a corporation, duly organized under and by virtue of the laws of the State of Texas, and domiciled in Dallas, Texas, where it has its principal place of business." 2/ Plaintiffs in the instant case again moved for a remand, and it was granted. The District Judge invoked the doctrine of judicial estoppel, which he defined by quoting *Long v. Knox*, 155 Tex. 581, 291 S.W. 2d 292, 295 (1956): " '[A] party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made.' . . [I]t is not necessary that the party invoking this doctrine have been a party to the former proceeding." Thus the court, while not actually finding that Southwestern was not a Missouri citizen, held that "under the doctrine of judicial estoppel, Southwestern Bell is estopped to allege its Missouri domicile as a basis for diversity jurisdiction in the instant case." Southwestern now brings this mandamus proceeding to compel the District Judge to retain the case in his court.

[1] As a general rule, a federal district court order remanding a removed case to state court "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). However, the Supreme Court has recently articulated an exception to this principle. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976), a district judge remanded

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2/ The pleading was styled a "plea of privilege" and alluded to Southwestern's purported right to "exclusive venue in the county of one's residence, provided by law." Apparently it was an attempt to have the case transferred from Harris to Dallas County.

a removed case because his docket was crowded with high-priority cases that would, in his opinion, unjustly delay plaintiffs' relief if they had to await a trial on the merits in federal court. The Supreme Court held that § 1447(d) did not preclude review in this situation. The Court noted that § 1447(d) had to be construed in conjunction with § 1447(c), which sets forth the only permissible basis for remand: that "the case was removed inprovidently and without jurisdiction." Thus, the Court concluded, if a district judge's reason for remanding a case is outside the grounds specified in § 1447(c), as Judge Hermansdorfer's was, the barrier to review in § 1447(d) is also inapplicable, and mandamus is a proper remedy to redress the illegal remand order.

Under *Thermtron Products*, the question before us is purely a legal one: 3/ may a district court utilize the doctrine of judicial estoppel as the basis for holding that a case was removed "improvidently and without jurisdiction" within the meaning of § 1447(c)? We answer this question in the negative.

3/ That is, the question is not whether Southwestern's behavior was so wrongful as to justify invocation of the judicial estoppel doctrine in whatever circumstances that doctrine might be deemed a legally proper ground of decision. That question need not be considered, just as the Court in *Thermtron Products* did not reach the issue of whether Judge Hermansdorfer's docket really was "too crowded."

In *Robertson v. Ball*, 534 F. 2d 63, 65 (CA5, 1976) we found an "express invocation by the district court of the § 1447(c) grounds for remand" in the lower court's recitation that "the action was not 'one of which this [district] court would have had original jurisdiction.' " The text of 28 U.S.C. § 1441(b) makes it clear that the District Court's reasoning in *Robertson* was legally sufficient under § 1447(c). The question in the instant case is whether the respondent's basis for disclaiming jurisdiction was so far removed from what § 1447(c) contemplates that it justifies the extraordinary remedy of mandamus.

[2-7] The scope of the federal removal statutes is a matter of federal law. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104, 61 S. Ct. 868, 85 L. Ed. 1214 (1941); *cf. Mas v. Perry*, 489 F. 2d 1396, 1399 (CA5), *cert. denied*, 419 U.S. 842, 95 S. Ct. 74, 42 L. Ed. 2d 70 (1974) (diversity of citizenship is a federal question).[4] Federal courts deciding federal issues have applied the judicial estoppel doctrine cautiously, usually confining it to circumstances in which the opposing party took action in reliance upon the estopped party's prior stance.[5] Whatever the scope of the doctrine may be, so far as we have been able to discover it has never been employed to prevent a party from taking advantage of a federal forum when he otherwise meets the statutory requirements of federal jurisdiction. Persons who meet those criteria have a statutory,[6] and indeed a consitutional,[7] right to resort to the federal courts. A district court

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[4] For this reason *Long v. Knox*, *supra*, and *Johnson Service Co. v. Transamerican Ins. Co.*, 485 F. 2d 165 (CA5, 1973), cases relied on by the respondent, are not controlling authorities here. They were unambiguously founded on the judicial estoppel rules of the state of Texas. "In diversity litigation in the federal courts where nonfederal issues are at stake, probably the *Erie* and *Angel v. Bullington* decisions compel the application of the relevant state formulation of the [judicial estoppel] principle, if any. As to federal issues, however, United States courts are free to follow such doctrine as they think proper." 1B J. Moore, Federal Practice Paragraph 0.405[8] at 771 (1974). *See also Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176, 63 S. Ct. 172, 87 L. Ed. 165 (1942).

[5] J. Moore, *loc. cit.* at 769-70; *cf. Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F. 2d 541, 550 (CA5, 1968).

[6] *Thermtron Products*, 423 U.S. at 345, 96 S. Ct. at 590, 46 L. Ed. 2d at 550 & n. 9.

[7] *Terral v. Burke Constr. Co.*, 257 U.S. 529, 42 S. Ct. 188, 66 L. Ed. 352 (1922).

has no authority to negate that right simply because such a person has not observed the consistency in pleading that the forum state may demand.[8] Judicial estoppel principles cannot conclusively establish jurisdictional facts. If facts come to light casting significant doubt on the power of a federal court to hear a pending case, it must, of course, re-examine its jurisdiction. Southwestern's 1968 pleading has some probative value as evidence that the company is a citizen of Texas. In light of this newly discovered evidence, the District Court should make a suitable inquiry into the question of whether the parties are truly diverse. We do not express a view one way or the other. We only hold that the problem of jurisdiction must be resolved in accordance with the facts as they are, not as Texas jurisprudence concerning estoppel might deem them to be.

A writ of mandamus will issue directing the District Court to vacate its remand order and conduct further proceedings not inconsistent with this opinion.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, GEWIN, COLEMAN, AINSWORTH, GODBOLD, DYER, CLARK, RONEY, GEE,

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[8] The only case on point that we can find reached a similar conclusion. In *Egerton v. Starin*, 91 F. 932 (C.C.D. Conn. 1899), the plaintiff filed suit in state court, describing himself as "William C. Egerton, of said New Haven." The defendant, a citizen of New York, removed the case to federal court, and Egerton moved to remand on the ground that he himself was also a New York citizen. The District Judge refused to accept Egerton's original pleading as conclusive. He granted the motion, holding, *inter alia*, that "[t]he question of residence is to be determined, not merely upon the pleadings in the state court, but upon the allegations of the petition to remand, and the testimony taken thereon."

TJOFLAT and HILL, Circuit Judges. *

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

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* Due to illness WISDOM and THORNBERRY, Circuit Judges, did not participate in this decision. GOLDBERG and MORGAN, Circuit Judges, are recused.

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WEST KEY NUMBER SYSTEM

Mrs. Oleta GRAVITT, Individually and as Executrix of the Estate of T. O. Gravitt, Deceased, et al.

v.

SOUTHWESTERN BELL TELEPHONE COMPANY and American Telephone and Telegraph Company.

James H. ASHLEY

v.

SOUTHWESTERN BELL TELEPHONE COMPANY et al.

Civ. A. No. SA75CA117.

United States District Court,
W. D. Texas,
San Antonio Division.

April 27, 1976.

Civil action initiated in state court against telephone company was removed to federal district court sitting in Texas. Plaintiffs' first motion to remand the case to state court was denied by the District Court, 396 F. Supp. 948. On plaintiffs' second motion to remand, the District Court, Spears, Chief Judge, held that under the doctrine of judicial estoppel, defendant telephone company was estopped to allege its Missouri domicile as a basis for diversity jurisdiction in the federal court;

and that plaintiffs would be allowed to recover all the costs and disbursements by reason of the improper removal of the action.

Motion to remand case to state court granted.

1. Estoppel Key 68(2)

Defendant telephone company would be estopped to allege its Missouri domicile as basis for diversity jurisdiction in civil action originally brought in Texas state court and subsequently removed to district court where, in 1968 suit filed in Texas, telephone company swore that it was "corporation, duly organized under and by virtue of the laws of the State of Texas, and domiciled in Dallas, Texas, where it has its principal office of business."

2. Removal of Cases Key 107(11)

In civil action originally filed in Texas state court and subsequently removed to federal district court sitting in Texas, plaintiffs, upon remand of case to state court, would be allowed to recover all costs and disbursements by reason of improper removal where suit was initially removed at instance of defendant following improvident filing by plaintiffs of amended complaint and where defendant was subsequently found to be judicially estopped from alleging its Missouri domicile as basis for diversity jurisdiction in federal court. 28 U.S.C.A. § 1446(d).

Pat Maloney, San Antonio, Tex., for plaintiffs.

Jack Hebdon, Hubert W. Green, James E. Barden, San Antonio, Tex., for defendants; Dewey, Ballantine, Bushby, Palmer & Wood, New York City, of counsel.

ORDER REMANDING CASE TO STATE COURT

SPEARS, Chief Judge.

This lawsuit was initially instituted in state court on November 15, 1974. Before its removal to this Court on May 8, 1975 almost six months of pretrial and discovery had been conducted, and a definite trial date had been set for July 11, 1975. Despite this, the parties have constantly bombarded this Court with numerous pretrial and discovery matters ever since the case was removed, and there are no indications that the case is yet ready for trial. In this connection, the records in the office of the Clerk reflect that for the period of time the case has been in this Court, 327 separate docket entries have been made, the last as recent as April 21, 1976.

As was pointed out by this Court in a prior opinion denying the first motion to remand, 1/ the improvident filing by plaintiffs of an amended complaint brought about the removal to this Court, and the defendants, having been handed the opportunity on a silver platter, immediately seized upon the totally unexpected turn of events to transfer the case to the forum of their choice.

[1] Now, however, the situation has dramatically changed. It appears that in a 1968 suit filed in Harris County, Southwestern Bell swore that it was a "corporation, duly organized under and by virtue of the laws of the State of Texas, and domiciled in Dallas, Texas, where it has its principal office of business." The plaintiffs argue, therefore, that under the doctrine of judicial estoppel, Southwestern Bell is estopped to

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1/ *Gravitt v. Southwestern Bell Telephone Co.*, 396 F. Supp. 948 (W.D. Tex. 1975).

allege its Missouri domicile as a basis for diversity jurisdiction in the instant case, and this Court agrees, the protestations of Southwestern Bell to the contrary notwithstanding. 2/ Having previously elected to make its judicial bed in Texas, it must now lie in it. It cannot enjoy the best of two worlds.

The Supreme Court of Texas in *Long v. Knox*, 1956, 155 Tex. 581, 291 S.W. 2d 292, 295, in explaining the doctrine of judicial estoppel, said that "a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made", and that "it is not necessary that the party invoking this doctrine should have been a party to the former proceeding."

In *Johnson Service Co. v. Transamerica Insurance Co.*, 485 F. 2d 164 (5th Cir. 1973), the Fifth Circuit Court of Appeals discussed the doctrine of judicial estoppel at some length, and concluded that it "is a technical rule designed to meet [the] needs of broad public policy", and is "directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings. . . ."

2/ In an affidavit filed by the attorney who represented Southwestern Bell in the 1968 case, it is stated that the plea of privilege filed therein, which contained the quoted language, was "intended to refer only to the fact that Southwestern Bell is duly licensed to do business as a foreign corporation in the State of Texas". However, "a corporation, duly organized under and by virtue of the laws of Texas", constitutes a clear and unambiguous allegation concerning Southwestern Bell's state of incorporation, and could hardly be characterized as the description of a foreign corporation duly licensed to do business in Texas. Significantly, the Texas venue provisions are more favorable to domestic corporations than they are to foreign corporations. *Commercial Ins. Co. of Newark v. Adams*, 369 S.W. 2d 927 (Tex. Sup. Ct. 1963).

So, after virtually monopolizing the time and energies of a state court for six months, and a federal court for almost a year, this case has come full circle. It was removed to federal court as the result of a fluke, pure and simple, and it must be remanded to the state court because of a doctrine "designed to meet the needs of [a] broad public policy". In the end, however, justice is done, since the case will now be tried in the forum in which it was originally filed, and where, except for the bungling of plaintiffs, it would have remained.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this action was improperly removed, and that the plaintiffs' second motion to remand be, and the same is hereby, GRANTED. The Clerk of this Court is directed to return to the state court from whence they came, all records and proceedings received therefrom by this Court, as well as all records and proceedings filed in this Court since the removal date.

[2] It is FURTHER ORDERED that the plaintiffs recover all their costs and disbursements by reason of the improper removal of this action, as provided by Title 28, United States Code, Section 1446(d).

* * *